United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Performance Contracting, Inc., dba PCI, Respondent.	OSHRC Docket No. 11-3095

Appearances:

Donna F. Bond, Esq. and Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor,
Seattle, Washington
For the Complainant

Gary W. Auman, Esq., Dunlevey, Mahan & Furry
Dayton, Ohio
For the Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Performance Contracting, Inc., dba PCI ("PCI" or "Respondent"), as a part of a three-day inspection of the Indian Head Casino[1] worksite in Warm Springs, Oregon. The inspection took place on September 14, 2011. As a result, OSHA issued a *Citation and*

1. Penta was the general contractor for the Indian Head casino project, and PCI was the insulation subcontractor for the project. (Tr. 24-26, 82). PCI hired Scaffold Erectors to assemble and dismantle the scaffolds it used at the worksite. (Tr. 104-05).

Notification of Penalty ("Citation") to the Respondent alleging three serious violations with proposed penalties of $2,700.00. PCI timely contested the Citation. Prior to the trial, the parties submitted a Joint Motion for Partial Settlement. As a result, the parties agreed to proceed to trial on Item 1a of the Citation, with a proposed penalty of $1,700.00. The parties settled Items 1b and 1c by agreeing to reclassify these violations from serious violations to other-than-serious violations with a penalty of $500.00 each to be assessed. (JX-2). A one-day trial was held in Portland, Oregon on February 28, 2013. The parties timely submitted post-trial briefs.

Stipulations

The parties stipulated to the following: (*See* JX-1).

1. The Occupational Safety and Health Administration had jurisdiction over Respondent's worksite at 3240 Wasley Lane, Warm Springs, OR 97761 ("Worksite") at the time of the inspection at issue in this case.

2. This Court [OSHRC] has jurisdiction to hear this matter.

3. Compliance Safety and Health Officer ("CSHO") Alex Bedard was a duly authorized representative of the Secretary at the time of the inspection at issue in this case.

4. If the Citation is affirmed, the proposed adjusted penalty, as calculated in Exhibit A to the Complaint, was calculated correctly with reference to OSHA's policies and procedures.

5. The scaffold on site was erected by an independent contractor, Scaffold Erectors.

Jurisdiction

Jurisdiction over this action is conferred upon the Commission pursuant to section 10(c) of the Act. The parties have stipulated and the record establishes that at all times relevant to this action, Respondent was an employer engaged in a business and industry affecting interstate

commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Complaint and Answer*; *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

Background and Relevant Testimony

A multi-level scaffold on the Indian Head Casino building's west side is the subject of the Citation. (Tr. 36; CX-1). At issue is whether PCI barricaded the unprotected area to prevent employee exposure to falling objects from the scaffold. On the day of the inspection, PCI was doing framing work on the inside of the building's northeast corner. PCI was also working from scaffolds to install styrofoam insulation panels on the exterior of the building's west side. (Tr. 135, 145–46; RX-1). The scaffolding on the west side of the building had just been released to PCI by Scaffold Erectors. (Tr. 68). A PCI employee had inspected the scaffold earlier that morning, as shown by an inspection tag. (Tr. 53; CX-5).

The CSHO met Julia Weaver (PCI's Branch Safety Engineer), Joseph Russell (a Project Manager for PCI's parent company, PCG) and Curt Carlson (an employee of Penta) at PCI's work trailer, which was located about 30 feet from the southeast corner of the building. The CSHO began his inspection of PCI's work areas at about 9:15 a.m. During the walk-around inspection, the CSHO was accompanied by Ms. Weaver; Mr. Russell and Mr. Carlson joined them for certain parts of the walk-around inspection. (Tr. 24–26, 30, 35, 63, 68, 104, 136).

First, the CSHO observed PCI's interior framing work in the northeast corner of the building. Then Mr. Russell saw the CSHO, Ms. Weaver and Mr. Carlson exit the building through an opening ("the opening") in the west side of the building. (Tr. 30, 135, 148). After going through the opening, the CSHO, Ms. Weaver, and Mr. Carlson walked underneath the scaffolding that had been erected along the west side of the building. (Tr. 120; RX-9). In doing so, they went through a space underneath the scaffold's planking which was between the cross-

bracing of the two abutting sections of scaffolding. The space was about 24 inches wide.[2] (Tr. 120; RX-9). Additionally, there was an open area formed by the gap between the interior edge of the scaffolding and the exterior wall of the building ("unprotected area") above their heads.

Ms. Weaver estimated that it took approximately one second to walk through the unprotected area. (Tr. 111). The inspection group went through the opening only once. (Tr. 124). Mr. Russell confirmed that the opening was not one of the three designated access points approved by the general contractor, Penta. (Tr. 142–43, 148). Mr. Russell was regularly on the jobsite and never observed anyone walk through the opening on any other occasion. (Tr. 148–49).

The CSHO also observed employees installing styrofoam insulation panels from one end of the scaffold platform to the other. (Tr. 38). He climbed up onto the scaffold during his inspection, at which time he saw styrofoam panels, tools, and buckets of adhesive at various places on the scaffold platform. (Tr. 36–39). He did not see any materials directly above the opening at that time. (Tr. 79). While climbing the scaffold stairs, the CSHO noticed that there were no toe boards on the side of the scaffold closest to the building ("interior side"). (Tr. 36). According to PCI, toe boards were installed on the interior side of the scaffold to the south of the opening (as depicted in RX-2 and CX-1); however, toe boards were not installed on the interior side of the scaffold to the north of the opening. (Tr. 113, 120–21; CX-1, RX-2, RX-7).

The CSHO testified that he thought the scaffold's interior edge was 15 or 17 inches from the building. (Tr. 44). Ms. Weaver testified that after lunch, which was after the walk-around, she took pictures to show an employee measuring the distance from the building's exterior wall to the interior edge of the scaffold to be 12 inches. (Tr. 118; RX-4, RX-5).

2. Mr. Russell estimated the width to be about 12 ½ inches, while Ms. Weaver estimated it to be about 24 inches. Because Ms. Weaver actually walked through the space, her estimate is credited. (Tr. 120, 153).

Applicable Law

To establish a *prima facie* violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) (citations omitted), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). The Secretary does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

Discussion

Citation 1, Item 1a

Item 1a of the Citation alleges a serious violation as follows:

> *29 C.F.R. §1926.451(h)(2)(i): The area below the scaffold was not barricaded, and employees were not prohibited from entering the hazard area.*
>
> *Or in the alternative*
>
> *29 C.F.R. §1926.451(h)(2)(ii): A toe board was not erected along the edge of platforms more than 10 feet (3.1 m) above lower levels for a distance sufficient to protect employees below, except on float (ship) scaffolds where an edging of ¾ x 1-1/2 inch (2 x 4 cm) wood or equivalent may be used in lieu of toe boards.*
>
> *Indian Head Casino Project – (a) Workers entering the building's West end were potentially exposed to falling building materials located at the edge of scaffold*

planks located approx. 15 feet above the entrance.

The cited standard provides:

> 29 C.F.R. §1926.451(h)(2): Where there is a danger of tools, materials, or equipment falling from a scaffold and striking employees below, the following provisions apply:
> (i) The area below the scaffold to which objects can fall shall be barricaded, and employees shall not be permitted to enter the hazard area; or
> (ii) A toe board shall be erected along the edge of platforms more than 10 feet (3.1 m) above lower levels for a distance sufficient to protect employees below, except on float (ship) scaffolds where an edging of ¾ x 1½ inch (2 x 4 cm) wood or equivalent may be used in lieu of toe boards.

The Standard Applies

The parties do not dispute the cited standard applies. There is no dispute that the opening on the west side of the building, which the inspection group walked through, was not barricaded to prevent its use as an access point. Further, the parties agree that on the interior side of the northern part of the scaffold, there were no toe boards in place at the time of the inspection. The Court finds the standard is applicable.

The Terms Were Violated

In its post-trial brief, PCI argues there was no hazard. It asserts that materials were not stored or stacked on the scaffold above the unprotected area of the opening. Further, it asserts that the opening was not an approved access point, that no one had been seen using it as such, and that no employees were observed standing or working in the unprotected area between the scaffold and the building. Finally, PCI asserts there was no reason for an employee to be in that unprotected area because the application of stonework to the lower half of the building would be done after the scaffolding was removed. (R. Br. 18-20; Tr. 124, 142-43, 146-49).

The Secretary asserts that the terms of 29 C.F.R. § 1926.451(h)(2)(i) were violated because there was no barricade to prevent employees from using the opening on the west side of

the building as an access point. The Secretary also asserts that an employee could be exposed to materials falling from the scaffold as there was no toe board in place to prevent the materials from rolling off and falling onto someone below. (S. Br. 11–12). The Court agrees.

PCI concedes that it had employees working on the scaffold with materials and tools to install styrofoam insulation panels. It asserts, however, that no hazard existed because materials were not directly above the opening and employees were not working under the scaffold in that unprotected area. (R. Br. 13). PCI provided a photograph, RX-8, to demonstrate that the gap between the building and scaffold was not big enough for a bucket to fall through; the bucket shown in RX-8 contains a tape-roll, plastering hawk and some mesh. While there was no one working above the opening at the time of the inspection, the evidence shows the panels were being continuously installed along the west side of the building. (Tr. 38). Because PCI employees were working from more than one place on the scaffold, the Court concludes that it is reasonable to expect that at some point, tools and materials could have been on the scaffold over the unprotected area.

The Court finds that the opening was not barricaded and was easily accessed, as shown by the fact that the inspection group walked through the opening and under the scaffold. The Court also finds that there was a hazard of falling objects in the unprotected area between the building and the scaffold. The Court concludes that PCI did not comply with the requirement to barricade the unprotected area where objects could have fallen from the scaffold.

Employer Knowledge

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence[3] could have known, of the violative condition. *Dun-Par Engineered Form Co.,* 12

3. "In assessing reasonable diligence, the Commission has considered 'several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate

BNA OSHC 1962, 1965 (No. 82-928, 1986). The employer's knowledge is directed to the physical conditions that constitute a violation and does not require that the employer understood the conditions were actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–1080 (No. 90-2148, 1995) (citations omitted), *aff'd without published opinion*, 1996 WL 97547 (5th Cir. 1996). Constructive knowledge of a hazard may be established where the violative condition and the presence of employees are in a conspicuous location, or are otherwise readily observable. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996).

The Court finds that PCI could have known there were no toe boards on the interior side of the scaffold, which exposed employees below to falling objects. The lack of interior toe boards was easily observed and detectable, and PCI's foreman and competent person had inspected[4] the scaffold that morning. (Tr. 53). Further, Mr. Russell, the project manager, was onsite and could have easily seen that the opening on the west side of the building had no barricade to prevent employee access. (Tr. 133, 146). The actions and knowledge of supervisory personnel are generally imputed to their employers. *Revoli Const. Co*., 19 OSHC 1682 (No. 00-0315, 2001) The Court concludes that PCI had constructive knowledge of the violative condition.

Employee Exposure

To prove employee exposure, the Secretary must show that it is "reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been,

---

hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.'" *Gen. Motors Corp*., 22 BNA OSHC 1019, 1030, (No. 91-2834E, 2007) (citing *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001)).

4. An employer's obligation to inspect its workplace for hazards "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Hamilton Fixture*, 16 BNA OSHC 1079, 1087 (No. 88-1720, 1993) (citation omitted), *aff'd without published opinion*, 28 F.3d 213 (6th Cir. 1994). *See N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) (employer has constructive knowledge of a violation if employer fails to use reasonable diligence to discern the presence of a violative condition). In this case, the competent person had inspected the Worksite but failed to observe that the opening had not been barricaded and toe boards had been erected.

are, or will be in the zone of danger." *KS Energy Services, Inc.*, 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008) (citations omitted). Employees may be in the zone of danger "when they engage in activities in the course of their assigned working duties, their personal comfort while on the job, or their normal means of ingress and egress to their assigned workplaces." *Id.*

The Court finds that employees were exposed to the hazard of falling objects in the unprotected area at issue. Commission case law does not require actual employee exposure. *See KS Energy*, 22 BNA OSHC at 1265. Here the inspection walk-around demonstrated that the cited opening was a means of access on the west side of the building. PCI employees were working from the scaffold on the day of the inspection, and it was reasonably predictable that employees could have accessed the opening. The Court concludes that employees could have been exposed to the cited hazard during the course of their normal work activities or otherwise, including inadvertence.[5] The Secretary has met his burden of proving a violation of the standard. Citation 1, Item 1a will be AFFIRMED, but for the reasons stated below, as an other-than-serious violation.

Affirmative Defenses

Respondent has not advanced any affirmative defenses for the Court's determination. In essence, Respondent argues the Secretary has not established a violation for the reasons stated, and addressed, above.

Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the

5. It is clear that the standard requires a physical restriction upon the inadvertent or accidental entry into the hazardous area. *See, e.g., Tobacco River Lumber Company*, 3 BNA OSHC 1059, 1064 (No. 1694, 1975) ("Mental fences might serve to reduce the probability of intentional entry but they do nothing to prevent accidental entry.")

employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary argues this Item should be classified as serious because an employee could have suffered broken bones, a broken neck, or serious head injury if a bucket of adhesive had fallen off the scaffold. (S. Br. 16). The Secretary bases this on the CSHO's estimate that the gap between the scaffold and building was 15 to 17 inches—large enough for a bucket to fall through. (Tr. 44; S. Br. 12). However, the CSHO did not measure the bucket's size or the distance between the scaffold and the wall. (Tr. 176–78). The CSHO based his estimate on a review of a photograph taken by PCI. (Tr. 167–68; RX-4).

PCI counters that the buckets it used were too large to fit into the gap between the wall and the scaffold, which PCI measured as 12 inches. (R. Br. 17; Tr. 118; RX-4, RX-5). PCI demonstrated this point by placing a bucket in the gap between the scaffold and building to establish that it could not fall through. (Tr. 123-24; RX-8).

The CSHO, as noted above, did not measure the distance between the scaffold and the building. The Court finds his estimate of the distance, which he based on a review of a photograph he did not take, to be unpersuasive. Instead, the Court accepts PCI's measurement of the gap at 12 inches, and further finds that the buckets used for adhesive were too large to fit through the 12-inch gap. However, other smaller items (such as rollers, mesh, spatulas and hawks) could have fallen through that gap. (R. Br. 21). Even so, it is unlikely that an employee wearing a hardhat would have sustained a serious injury.[6] Therefore, the Court concludes that

6. There is nothing in the record regarding whether employees routinely wore hard hats at this worksite. That said, with no evidence being presented to the contrary, the Court assumes that employees were wearing hard hats, which

this item is appropriately classified as other-than-serious.

It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g., Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1995). The CSHO testified that a ten percent discount was given due to the employer's size plus a discount for good faith because PCI was cooperative during the inspection and immediately corrected the violative conditions. (Tr. 60–61). Based on these factors and the brief and limited nature of the possible exposure, the Court finds a penalty of $500.00 to be appropriate. A penalty of $500.00 will be assessed for Citation 1, Item 1a.

---

would significantly diminish the severity of any injury.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1a, alleging a violation of 29 C.F.R. § 1926.451(h)(2)(i), is AFFIRMED as other-than-serious and a penalty of $500.00 is ASSESSED.

2. Citation 1, Item 1b, alleging a violation of 29 C.F.R. § 1926.451(c)(2)(i), is AFFIRMED as other-than-serious and a penalty of $500.00 is ASSESSED.

3. Citation 1, Item 1c, alleging a violation of 29 C.F.R. § 1926.454(b), is AFFIRMED as other-than-serious and a penalty of $500.00 is ASSESSED.

/s/
Patrick B. Augustine
Judge, OSHRC

Date: July 31, 2013
Denver, Colorado